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Robert Resendes, Petitioner/Appellant, vs. Tamara Joy Resendes, Respondent/Appellee : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ROBERT RESENDES, Petitioner/Appellant, vs. **TAMARA JOY RESENDES,** Respondent/Appellee.	**Case Number:** 20050364

REPLY BRIEF OF THE APPELLANT

AN APPEAL FROM A PART OF A DIVORCE DECREE OF THE SIXTH JUDICIAL DISTRICT COURT OF SEVIER COUNTY, THE HONORABLE PAUL LYMAN PRESIDING.

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The trial court erred when it imposed minimal support obligations on the Appellant (hereinafter "Mr. Resendes") without taking into account the income Appellee (hereinafter "Ms. Resendes") is reasonably capable of earning. Ms. Resendes claims the court properly calculated alimony to Mr. Resendes based on a part-time income for Ms. Resendes. However, before awarding alimony, the court must first determine the financial requirements of the parties, the gross income available to the parties, and the recipient spouse's ability to produce income. U.C.A. §30-3-5(8)(a)(i)-(iv).

U.C.A. §78-45-7.5(7)(c) states in part that "[i]f a parent has no recent work history or their occupation is unknown, income shall be imputed at least at the federal minimum wage for a 40-hour work week . . ." In interpreting the statute for correctness, the court should have imputed Ms. Resendes' income, based on at least a minimum wage 40-hour work week, as the statute specifies, when income is imputed. In not doing so, the court created a serious inequity and abused its discretion.

I. THE STATUTE THE COURT USED REQUIRES IMPUTATION OF FULL-TIME EMPLOYMENT INCOME TO MS. RESENDES

Ms. Resendes claims Mr. Resendes misconstrues U.C.A. §78-45-7.5(7)(c), and that this statute should only be applied if U.C.A. §78-45-7.5(7)(d) does not apply. U.C.A. §78-45-7.5(7)(c) states:

> If a parent has no recent work history or their occupation is unknown, income shall be imputed at least at the federal minimum wage for a 40-hour work week. To impute a greater income, the judge in a judicial proceeding or the presiding officer in an administrative proceeding shall enter specific findings of fact as to the evidentiary basis for the imputation.

By using the term "at least" the legislature obviously contemplated more than minimum wage, in appropriate circumstances like these where a party clearly has qualifications and skills above those of a minimum wage employee. The court took evidence and entered its basis for imputing $16.60 an hour for Ms. Resendes. It simply erred in not imputing full time, or at least 36 hours a week.

Ms. Resendes herself misconstrues this statute where she interprets the statute as applying only if there is no work history at all. §78-45-7.5(5)(a)(b)(c) and (d) are not mutually exclusive, but should be interpreted as a whole. The statute applies "if there is no recent work history." The court did in fact discuss Ms. Resendes' past work history, but did not have any current or up-to-date frame of reference to draw from regarding income and hours because Ms. Resendes has been unemployed or underemployed; thus, the court imputed Ms. Resendes' income. The court based its imputation on an income of $16.60 an hour, but only imputed 72 hours a month, or six (6) 12 hour shifts. However, the court should have imputed at least a 36-hour work week to Ms. Resendes.[1] If the court must impute a party's income, the statute and relevant case law dictates that the imputation should be based on a full-time income unless there is a compelling reason to do otherwise, as stated in subsection (d). §78-45-7.5(5) Utah Code 2004. While Ms. Resendes claims that subsection (d) does not require imputation in the absence of those circumstances, she provides no viable legal basis to avoid the statutory requirements. The appeals court should determine that the trial court has interpreted the statute incorrectly.

[1] It is common knowledge that hospital nurses work twelve hour shifts, and that therefore 36 hours a week is considered full-time.

Ms. Resendes' income should be calculated on a full-time basis where Ms. Resendes has the ability and capacity to work a 36-hour work week. Her children are all in school full-time, and she has two high school age children to aid her, and Mr. Resendes, who has joint legal custody, is available on the weekends, evenings, and holidays to assist in watching the children. Further, Mr. Resendes supported Ms. Resendes' desires to return to nursing school and massage therapy school. He helped care for the children and used marital funds to pay for the education, so that Ms. Resendes could support herself when needed. Now it is needed.

II. THE COURT ABUSED IT'S DISCRETION AND A SERIOUS INEQUITY AROSE WHEN IT DID NOT IMPUTE A FULL-TIME INCOME TO MS. RESENDES

When the Court relied on UCA §78-45-7.5(7) to impute Ms. Resendes' income, the court clearly abused its discretion by not complying with subsection (c) of the statute, and should have imputed at least "a 40-hour work week." Ms. Resendes states in her brief that the court in *Kelly v. Kelly* held it would not disturb the trial court's alimony award unless inequity results, and the trial court manifested a clear abuse of discretion. *Kelly v. Kelly*, 9 P.3d 171, 179 (Utah App. 2000); quoting *Childs v. Childs*, 967 P.2d 942, 946 (Utah App. 1998). Further, Ms. Resendes states that Mr. Resendes does not dispute that the Court has "considerable discretion" so long as it does not abuse its discretion. *Cummings v. Cummings,* 821 P.2d 472 (1991).

In this instance, however, the trial court did manifest a clear abuse of discretion, wherein the court incorrectly interpreted the statute, and did not include all reasonable income available to Ms. Resendes, i.e., her ability to provide for her own support while

working full-time as a registered nurse, when the Court calculated alimony to be paid by Mr. Resendes. As outlined in U.C.A. §30-3-5(8)(ii), among other factors, the trial court must first consider the recipient's earning capacity and ability to produce income before awarding alimony to a spouse.

Ms. Resendes states that there are several Utah cases that have upheld the imputation of part-time income to an alimony recipient in a divorce. Ms. Resendes cites to *Reinhart v. Reinhart*; however, in that case the court determined part-time computation was appropriate because the custodial parent was attending a full-time graduate nursing program, in addition to having primary physical custody of the parties' four minor children. *Reinhart v. Reinhart*, 963 P.2d 757, 758 (Utah App. 1998). In that case, the trial court questioned whether the plaintiff could be a full-time student in a graduate nursing program as well as work a full-time schedule while caring for her four minor children. *Id.* at 758. This case can be distinguished, wherein Ms. Resendes is not attending school, and the parties' children are all in school full-time now. Ms. Resendes obtained a nursing degree for just this type of circumstance, so she could work and support herself should the need arise. In this case, Mr. Resendes supported Ms. Resendes while she obtained her nursing degree during the marriage for just this circumstance. The parties both live in the same small town, wherein Mr. Resendes can assist in childcare on the weekends and in the evenings while Ms. Resendes is working, and there are two high school age children who can assist Ms. Resendes in adequately caring for the younger children.

Ms. Resendes also cites *Fletcher v. Fletcher,* 615 P.2d 1218, 1223 (Utah App. 1980), a much older case, where the party's income was calculated on a part-time basis

because the recipient spouse was caring for three minor age children. However, in that case the recipient spouse had a pre-school age child who was not yet in school full-time, and the other two children were age eight and under. Further, the mother supported the father through his professional training. In contrast, the parties' children in this case are all in school full-time now, and two are attending high school and should be able to assist in childcare. Also, Mr. Resendes supported Ms. Resendes through her education and training. Therefore, *Fletcher* is not dispositive, if even relevant.

Another case Ms. Resendes relies on is *Rehn v. Rehn*. In that case, the trial court refused to impute a higher income to Ms. Rehn, and stated that "it is sufficient to impute a lesser income to the recipient spouse so that she might give adequate care and nurturing to the parties' minor children." *Rehn v. Rehn*, 974 P.2d 306, 311 (Utah App. 1999); quoting *Fletcher*, 615 P.2d at 1223. Contrary to the case at bar, the court does not indicate that Ms. Rehn's income is from part-time employment. However, the two children in that case were six and nine years old. In this case, Ms. Resendes has two older children to help her in providing "adequate care and nuturing" to her two younger children, and Mr. Resendes lives in the same small town, and can assist with the childcare on weekends and holidays. Moreover, if Ms. Resendes works full-time as a nurse, she will only work three 12-hour shifts a week, for a total of 36 hours a week. Assuming she worked nights or weekends, she would still have the older children and Mr. Resendes to assist her in providing "adequate care and nurturing" for the children during the minimal time she would be required to work while the children were in her care.

Ms. Resendes states that the court in *Cummings*, a case Mr. Resendes uses to support his position, may have imputed a lesser income than a full-time wage based on the mother's highest hourly wage if she had been the custodial parent. Ms. Resendes errs in her reading of this case. In fact, the mother was given back custody of the children in that case. The trial court's finding that custody should be given to the father was overturned, and the appeals court gave custody back to the mother. The court also upheld the full-time imputation of the mother's income based on the highest wage she earned, even though the mother would be the custodial parent thereafter. *Cummings v. Cummings*, 821 P.2d 472 (Utah App. 1991).

Finally, Ms. Resendes does not dispute that *Mancil v. Smith* is the most recent ruling from the appeals court. 18 P.3d 509 (Utah App. 2000). It has not been overturned or controverted. It clearly provides that it is "Utah's clear policy to require both parents to support their child to the extent that each is financially able." *Id.* at 511.

The trial court erred in not imputing a full-time income to Ms. Resendes, where Ms. Resendes is financially capable of working as a registered nurse at least 36 hours a week in three shifts. She is not going to school, and does not have any children at home during the day while school is in session. In addition, Mr. Resendes did not help put Ms. Resendes through nursing school while they were married so that Ms. Resendes could claim only a minimum wage, or only have a part-time income imputed to her; it was their obvious intent to help Ms. Resendes be able to support herself. Ms. Resendes has two older children at home who can assist with childcare occasionally. Mr. Resendes is available in the evenings, on weekends, and holidays to watch the children, so the

Resendes' would only incur minimal, if any, childcare expenses. Thus, the trial court erred in not calculating Ms. Resendes' income on a full-time basis.

CONCLUSION

The trial court should have calculated a full-time income to the Appellee, based on UCA §78-45-7.5(7)(c), wherein if the court has no recent work history to draw from, the court must calculate at least a minimum wage of 40 hours a week. The Appellee has the training, health, and ability to earn $2,877.00 per month working as a registered nurse, and there are no statutory exceptions or other reasonable basis to avoid imputing full-time income. Based upon the foregoing facts and argument, Appellant respectfully prays that this court reverse the trial court on this issue, and order that support in this divorce be re-calculated, based upon Appellee's income in the amount of $2,877.00 per month.

Respectfully submitted this 2nd day of August 2006.

SCRIBNER & McCANDLESS, P.C.

BY: _____
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MAILING CERTIFICATE

I hereby certify that on this 2nd, day of August 2006, I mailed, postage prepaid, two accurate copies of the foregoing Appellant's Brief to:

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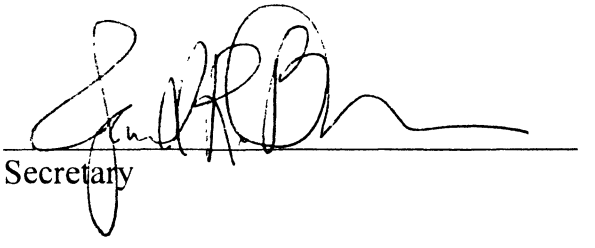

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